No. 93-1095

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

RALPH RIVERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's pretrial detention violated the Due Process Clause.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A23, is reported at 4 F.3d 1038. The opinion of the district court, Pet. App. A24-A28, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1993. On November 29, 1993, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including January 28, 1994. The petition for a writ of certiorari was filed on January 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was arrested on August 1, 1991, on a complaint charging him and 41 others with a number of drug offenses, including participating in a continuing criminal enterprise, in violation of 21 U.S.C. 848. He was detained prior to trial pursuant to 18 U.S.C. 3142(e) (Supp. IV 1992), on the basis of a judicial assessment that he posed an unacceptable risk of flight. Petitioner's trial commenced on March 9, 1993, but ended in a mistrial that was declared on April 16, 1993. On May 21, 1993, the district court ordered petitioner released on bail subject to a series of conditions. Pet. App. A24-A28. On the government's appeal of the release order, the court of appeals reversed. *Id.* at A1-A23. Petitioner's retrial began on November 15, 1993, and is currently in progress.

1. On August 1, 1991, petitioner and co-defendant Eric Millan were arrested and charged with participating in a conspiracy to distribute heroin. The government alleged that Millan was the leader of an organization that distributed heroin under the name "Blue Thunder" in New York City, and that petitioner was his second-in-command and shared responsibility for the day-to-day supervision of the organization's activities. The indictment charged that petitioner and Millan had participated in a continuing criminal enterprise, in violation of 21 U.S.C. 848. If convicted under that statute, petitioner faces a mandatory 20-year sentence and a maximum sentence of life imprisonment. Pet. App. A3; see 21 U.S.C. 848(a)-(d).

Petitioner has been detained at all times since his arrest. After a detention hearing on August 6, 1991, a

magistrate judge ordered petitioner detained because he presented a risk of flight. Pet. App. A3. Petitioner made two bail applications after his initial detention hearing. On the first occasion, United States District Judge Shirley Wohl Kram, to whom petitioner's case was assigned, referred the application to a magistrate judge, who on May 19, 1992, affirmed the original detention order. *Ibid.*

On the second occasion, on December 22, 1992, a different magistrate judge denied petitioner's bail proposal. The magistrate judge noted that petitioner had not identified any circumstances warranting a departure from the findings supporting the initial detention order. Because Judge Kram was not available to hear petitioner's significantly delayed appeal of the magistrate's ruling, it was heard by United States District Judge Sonia Sotomayor. Pet. App. A3-A4. After a hearing on February 18, 1993, Judge Sotomayor concluded that the government had amply demonstrated that petitioner continued to pose a risk of flight and a danger to the community. The judge found that petitioner was charged with a crime requiring a sentence of at least ten years' imprisonment if he was convicted; that bench warrants had been issued for petitioner's arrest in each of three prior cases because he had failed to appear in court; that petitioner no longer had significant ties to the community; that petitioner had traveled abroad and had ties to communities outside New York City; and that because of petitioner's role in the Blue Thunder organization, he had access to sufficient funds to facilitate flight and reimburse bail sureties if he decided to flee. *Id.* at A4.

On March 9, 1993, attorneys for the parties made opening statements in the trial of petitioner, Millan, and ten co-defendants before Judge Kram. On March 12, 1993, the government advised the district court that three agents involved in the investigation of the case had been arrested for narcotics trafficking. The court adjourned the trial and held a hearing to determine the effect of that information on petitioner's case. The court eventually found that the alleged misconduct by the arrested agents did not involve the investigation that resulted in petitioner's indictment, see *United States* v. *Millan*, 817 F. Supp. 1072, 1078 (S.D.N.Y. 1993), but also ruled (*id.* at 1081-1084) that the defense could cross-examine witnesses about the arrests because the government, in its opening statement, had referred to undercover participation in the Millan investigation by one of the arrested agents. Pet. App. A4-A5.

On March 23, 1993, the government advised Judge Kram that Millan's attorney, Michael B. Pollack, was about to be indicted on felony charges in the District of New Jersey. Although a colleague of Dietrich L. Snell, the prosecutor in petitioner's case, had known of the pending indictment in January 1993, he apparently did not inform Snell of the situation until March. After Millan learned of Pollack's situation, which Pollack had not previously revealed to him, Millan announced his intention to retain new counsel and requested a severance from the continuing trial of petitioner and the other co-defendants. The district court granted the application for a severance and declared a mistrial as to Millan. Subsequently, however, Millan decided to continue with Pollack as his attorney and to seek new counsel only if it became

necessary. Pollack was convicted on July 15, 1993. Pet. App. A5.

On April 14, 1993, the district court learned that between $50,000 and $80,000 that one of the arrested agents seized during the arrest of one of the defendants in petitioner's case was missing. In light of that evidence, petitioner, Millan, and several other co-defendants moved for a mistrial. Pet. App. A5. See *United States* v. *Millan*, 817 F. Supp. 1086, 1088 (S.D.N.Y. 1993). The court noted that "the entire vouchering process in this case is now suspect" and that further allegations of misconduct might arise. *Id.* at 1089. On that basis, the court granted the mistrial motions on April 16, 1993. *Id.* at 1090.

Petitioner moved to bar retrial on double jeopardy grounds. Pet. App. A5-A6. He also sought release on bail pending retrial, contending that his continued detention violated the Due Process Clause. The district court concluded that the period of pretrial delay had exceeded constitutional limits. Pet. App. A24-A28. On May 21, 1993, the district court ordered petitioner released on several conditions. Petitioner was required to post a $1 million personal recognizance bond secured by $500,000 in real property and the signatures of six financially responsible individuals; refrain from associating or communicating with any of his co-defendants except as needed to prepare his defense; not commit any crimes; report weekly by telephone to pretrial services; submit to home detention and electronic monitoring; and surrender his passport and all other travel documents. *Id.* at A27-A28; see *id.* at A6. On June 30, 1993, the district court granted the government's request for a stay of the order pending the outcome of the appeal. *Id.* at A7.

On July 30, 1993, the district court denied the pending motion to bar retrial on double jeopardy grounds and set October 12, 1993, as the date for the beginning of the retrial in the case. *United States* v. *Millan-Colon*, 829 F. Supp. 620, 637 (S.D.N.Y. 1993). The court found no indication that the government had intentionally provoked the defendants into moving for a mistrial, *id.* at 628, and also determined that despite the investigation of police misconduct that affected the Millan investigation, *id.* at 634, the trial could "resume without fear of further disruption stemming from unforeseen sources." Pet. App. A7. Petitioner's retrial began on November 15, 1993, and is expected to end in April 1994. Pet. 5.

2. The court of appeals reversed. Pet. App. A1-A23. The court held that petitioner's pretrial detention did not violate the Due Process Clause. Although the court recognized that the length of petitioner's detention weighed in favor of release (see Pet. App. A10-A11),[1] it found that because defense counsel's requests for adjournments had largely accounted for the first 19 months of the delay, petitioner bore "primary responsibility * * * for the delay between [his] arrest and retrial," and the length of his

[1] The court rejected petitioner's "highly speculative" argument that an appeal of the district court's denial of his motion to bar retrial on double jeopardy grounds would delay retrial to the point where due process was plainly violated. Pet. App. A11-A12. Noting that double jeopardy does not bar retrial unless the government intentionally provoked a mistrial, and that the record did not suggest that such a provocation had occurred, the court reasoned that the district court could proceed to trial, despite a pending interlocutory double jeopardy appeal, when the appeal was frivolous.

detention therefore weighed in his favor "to a significantly lesser extent than the district court [had] concluded." *Id.* at A12, A14.

The court observed that the district court had not found that petitioner no longer posed a risk of flight, but rather "regarded the risk * * *, however serious, to be outweighed by the other applicable factors." Pet. App. A15. The court of appeals itself concluded that petitioner "present[ed] a high risk of flight." *Id.* at A16.

Noting that the district court's ruling as to the danger petitioner posed to the community was "entirely conclusory," Pet. App. A17, the court canvassed petitioner's criminal record, which included two narcotics convictions, a conviction for criminally negligent homicide, and extensive alleged criminal activity during the probationary period following his homicide conviction. The court concluded that "the district court did not adequately examine the issue of dangerousness with respect to [petitioner]," and that petitioner "would pose a very serious danger to the community in the event of [his] pretrial release on bail." *Id.* at A21.

Finally, the court considered whether any conditions of release would reasonably assure petitioner's appearance at trial and the safety of the community. See 18 U.S.C. 3142(g) (Supp. IV 1992). Remarking that procedures for electronic surveillance could be circumvented, the court found that petitioner's appearance and the protection of the community "can be assured only by continued detention." Pet. App. A22. In light of all the factors it had reviewed, the court "discern[ed] no constitutional impediment to [petitioner's] continued detention." *Id.* at A23.

3. On January 7, 1994, petitioner's application for release from pretrial detention was presented to Justice Thomas, who denied the application. On January 24, 1994, petitioner's application for a stay addressed to Justice Blackmun and referred by him to the Court was denied. *Rivera* v. *United States*, No. A-550 (Jan. 24, 1994).[2]

ARGUMENT

Petitioner contends (Pet. 5-11) that this Court should grant review because the court of appeals wrongly decided a question left open in *United States* v. *Salerno*, 481 U.S. 739, 747 n.4 (1987), *i.e.*, "the point at which [pretrial] detention in a particular case might become excessively prolonged," and because the courts of appeals are divided regarding when such detention becomes so excessive as to violate the Due Process Clause.

1. At the outset, we note that petitioner's claim is very likely to become moot in the near future. Petitioner's trial began on November 15, 1993, and is expected to end in April 1994. Pet. 5. If he is acquitted, he will of course be released from detention on the instant charges. If he is convicted, he will be held pursuant to a judgment of conviction, rather than pursuant to a pretrial detention order. In either event, the claim petitioner raises will be moot. See, *e.g.*, *Murphy* v. *Hunt*, 455 U.S. 478, 482-483 (1982) (criminal defendant's suit challenging state court's denial of request for pretrial bail was moot after

[2] Petitioner's co-defendant, Eric Millan, who also has been subject to pretrial detention since his arrest, has also filed a petition for a writ of certiorari. See *Millan* v. *United States*, petition for cert. pending, No. 93-7623 (filed Jan. 21, 1994).

defendant was convicted in state court). Of course, it is possible that petitioner's trial will not end in acquittal or conviction but in a mistrial, and that his retrial will be postponed long enough for this Court to consider and decide the case. Yet only that relatively unlikely sequence of events will prevent this case from becoming moot long before the Court could render a decision on the merits. Accordingly, this case is not a suitable vehicle for review.[3]

2. In any event, the decision of the court of appeals was correct. The government may detain a defendant prior to trial consistent with the Due Process Clause of the Fifth Amendment so long as confinement does not amount to "punishment of the detainee." *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979); see also *United States* v. *Salerno*, 481 U.S. at 746 (pretrial detention must be "regulatory, not penal"). Absent an express intention to punish, whether detention constitutes impermissible punishment or permissible regulation turns on whether the government has a nonpunitive reason for detention and whether detention "appears excessive in relation to" the nonpunitive purpose. *Bell* v. *Wolfish*, 441 U.S. at 538 (quoting *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 169 (1963)). Pretrial detention of a defendant, when of reasonable duration, serves important regulatory purposes, including the prevention of flight and the protection

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[3] Petitioner's claim is not "capable of repetition, yet evading review" because of the speculative possibility that petitioner may be subject to a future prosecution, that bail will be denied, and that he will be detained pretrial for an extended period. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 108 (1983); *Lane* v. *Williams*, 455 U.S. 624, 633 n.13 (1982); *Murphy* v. *Hunt*, 455 U.S. at 482-483.

of the community from a potentially dangerous individual. *Salerno*, 481 U.S. at 747-749; *Schall* v. *Martin*, 467 U.S. 253, 264 (1984) (prevention of danger to community is legitimate regulatory goal); *Bell* v. *Wolfish*, 441 U.S. at 534 (government has legitimate interest in preventing flight by defendant). When, however, detention becomes "excessively prolonged," it may no longer be reasonable in relation to the regulatory goals of detention, in which event the detention may violate the Due Process Clause. See *Salerno*, 481 U.S. at 747 n.4; *United States* v. *Gelfuso*, 838 F.2d 358, 360 (9th Cir. 1988); *United States* v. *Gonzales Claudio*, 806 F.2d 334, 339 (2d Cir.), cert. dismissed, 479 U.S. 978 (1986).

The determination whether the length of pretrial detention has become constitutionally excessive rests on three factors: (1) the length of the detention; (2) the extent of the government's responsibility for the delay of the trial; and (3) the strength of the evidence on which the detention was based, *i.e.*, the evidence concerning the risk of the defendant's flight and the danger he poses to the safety of any other person or the community. See *United States* v. *Orena*, 986 F.2d 628, 630 (2d Cir. 1993) (stating factors and applying test to dangerousness); *United States* v. *Ojeda Rios*, 846 F.2d 167, 169 (2d Cir. 1988) (applying test to risk of flight and dangerousness); *United States* v. *Gelfuso*, 838 F.2d at 359 (considering length of detention and government's responsibility for delay). Although a district court's evaluation of the pertinent factors is normally reviewed for clear error, see, *e.g.*, *United States* v. *Quartermaine*, 913 F.2d 910, 915 (11th Cir. 1990) (purely factual findings underlying orders granting or denying detention); *United States* v.

Melendez-Carrion, 820 F.2d 56, 60 (2d Cir. 1987) (government responsibility for delay); *United States* v. *Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985) (danger to community and risk of flight), a determination as to whether the continued detention of a defendant alleged to pose a risk of flight or a danger to the community violates due process raises a legal question that is subject to plenary review. See *United States* v. *Zannino*, 798 F.2d 544, 546 (1st Cir. 1986); cf. *Quartermaine*, 913 F.2d at 915; *Gonzales Claudio*, 806 F.2d at 343.

The court of appeals correctly applied the factors bearing on whether a period of pretrial detention is constitutionally excessive. Although petitioner had been detained for a significant period, the court properly discounted the length of that detention, because the first 19 months of it were largely attributable to defense counsel adjournments. Thus, petitioner himself was primarily responsible for the delay between his arrest and retrial. See Pet. App. A12, A14.

Judge Sotomayor had previously found that petitioner was exposed to a lengthy term of imprisonment, that he had failed to appear in court in each of three prior cases, that he no longer had significant community ties, that he had traveled abroad and had ties to other communities, and that he had the resources to flee. See Pet. App. A4. On the basis of those facts, the court of appeals was obviously justified in finding (*id.* at A16) that petitioner presented a high risk of flight.

In light of petitioner's extensive criminal record, including two narcotics convictions and a homicide conviction, the court likewise reasonably concluded

that petitioner was also a danger to the community. Pet. App. A21. Finally, because, as the court accurately noted, electronic surveillance measures can be circumvented, the court reasonably determined that only continued detention could assure petitioner's presence at trial and prevent danger to the community. *Id.* at A22. The court of appeals' careful, fact-intensive evaluation of the factors pertinent to petitioner's application for release does not warrant this Court's review.

3. Petitioner is mistaken when he asserts (Pet. 7-11) that review is warranted because of a conflict between the decision below and decisions of other federal courts. Most of the published appellate decisions cited by petitioner found that the period of detention in question did not violate the Due Process Clause. See *United States* v. *Zannino*, 798 F.2d at 549; *United States* v. *Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986); *United States* v. *Infelise*, 934 F.2d 103, 105 (7th Cir. 1991); *United States* v. *Gelfuso*, 838 F.2d at 359; *United States* v. *Quartermaine*, 913 F.2d at 918.[4] The remaining decision, *United States* v. *Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986), ordered that a trial be held because continued detention would be unlawful, but it based that holding on a construction of the Speedy Trial Act, not the Due Process Clause. Moreover, *Theron* was decided without the benefit of this Court's views on the constitutionality of 18 U.S.C. 3142(e), as set forth in *Salerno*, 481 U.S. at 747-749. Consequently, none of the appellate deci-

[4] One case relied on by petitioner, *United States* v. *Denogean*, No. 93-2282, 1993 WL 483018 (10th Cir. Nov. 24, 1993), is an unpublished decision that has no precedential value, even in the Tenth Circuit. See *id.* at 2 n.1.

sions cited by petitioner conflict with the Second Circuit's decision in this case.[5]

In any event, the question whether a given period of pretrial detention violates the Due Process Clause turns on whether, in each case, the relevant factors establish that the period of pretrial detention is punitive. No court of appeals has held that any particular period of time in pretrial detention, apart from the other relevant factors, can establish a violation of the Due Process Clause. Accordingly, even if other courts of appeals had reached the conclusion that a period of pretrial detention equal to or shorter than the period at issue here violated the Due Process Clause, that conclusion would not conflict with the Second Circuit's conclusion that, on the facts of this case, the period of pretrial detention is not excessive.

[5] Any disagreement between the decision below and other decisions of the Second Circuit, *e.g.*, *United States* v. *Gonzales Claudio*, 806 F.2d at 342, is for that court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957). Likewise, further review is not warranted to consider the conflict, if any, between the decision below and the various district court decisions cited by petitioner. See Pet. 9-11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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